THE MEDIA'S INTEREST IN AND RIGHT TO ACCESS TO THE COURTS

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1. THE MEDIA'S RIGHT TO ACCESS TO THE COURTS[1]

In order to report the news, the press must engage in "news gathering," including news regarding court proceedings. Because news gathering is protected by the First Amendment[2] and the common law, judges must be very circumspect in closing any court proceeding to the public and the media or shielding any court document from public view. The following is a brief overview of the United States Supreme Court opinions establishing the media's right of access to the courts.

The First Amendment and common law rights of media access to the courts evolved in a series of United States Supreme Court cases which followed Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), in which the Court held that the media ordinarily could not be enjoined from publishing information obtained during open judicial proceedings. In response, courts began to close judicial proceedings -- usually at the request of criminal defendants. This resulted in a series of Supreme Court decisions which created and then expanded a First

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1 This issue is discussed in greater detail in Chapter One of Heinke, Media Law, which is published by the Bureau of National Affairs.

2 Branzburg v. Hayes, 408 U.S. 665, 707 (1972) ("news gathering is not without its First Amendment protections").

Amendment right of access to judicial proceedings, as well as one case establishing a common law right of access.[3]

In the first case presented to the United States Supreme Court, the Court did not accept a constitutional right of access to criminal proceedings. In Gannett Co. v. DePasquale, 443 U.S. 368 (1979), the Supreme Court affirmed a trial court's order closing a pre-trial suppression hearing, reasoning that pre-trial publicity could interfere with the defendants' Sixth Amendment right to a fair trial by prejudicing the jury pool. Id. at 378. Without deciding whether there was a First Amendment right of access to a pre-trial suppression hearing, the Court found that the trial court properly balanced the defendants' Sixth Amendment rights with any First Amendment rights which might exist. 443 U.S. at 391-93. This decision lead to a wave of court closures, which soon reached the Supreme Court.

The United States Supreme Court first explicitly recognized a First Amendment right of access to criminal trials in Richmond Newspapers v. Virginia, 448 U.S. 555 (1980). There, the Court reviewed an order which had completely closed an entire criminal trial, at the defendant's request. Id. at 560.

Writing for a fragmented Court, Chief Justice Burger distinguished the closure of the trial from the closure of the pre-trial suppression hearing in Gannett. Id. at 564. Without evidence that closure is required to protect the "superior right to a fair trial" or "some other overriding consideration[,]" a trial court cannot close a criminal trial. Id. Burger's opinion stated that, due to history and tradition, criminal trials were presumptively open proceedings under the First Amendment absent some "overriding interest articulated in findings." Id. at 581. Since the trial judge made no

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3 The United States Supreme Court acknowledged the existence of a "common-law right of access to judicial records" in Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

findings, failed to recognize any constitutional right to attend the trial, and did not consider alternatives to closure, closure was improper. Id. at 581. The opinion recognized that a trial court, however, may establish "time, place, and manner" restrictions on access to avoid an overcrowded courtroom. Id. 581-82 n.18.[4]

Richmond Newspapers left open the question of what interests might overcome the First Amendment right of access to government controlled information. This issue was first addressed in Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982). In Globe Newspaper, the Court confirmed Richmond Newspapers' holding that the public and the media have a First Amendment right of access to criminal trials and struck down, as violating the First Amendment, a state law excluding the public and press from the courtroom during the testimony of all minor victims in sex-offense trials. 457 U.S. at 603, 610-11.

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[4] There were four separate concurring opinions. Justice White filed a brief concurrence restating his belief that there was a Sixth Amendment right of access to "criminal proceedings." Id. at 581-82 (White, J., concurring). Justices Brennan and Marshall analyzed the historical tradition and functional purposes of open trials, concluding that the Virginia statute which permitted the trial closure violated the First Amendment. Id. at 598 (Brennan, J., concurring). Their opinion also recognized that there may be "countervailing interests" that are "sufficiently compelling to reverse this presumption of openness." Id. Justice Stewart's concurrence recognized a First Amendment right of access to "civil as well as criminal" trials. Id. at 599 (Stewart, J., concurring in judgment). He carefully distinguished this right from a right of access to pre-trial proceedings, such as the suppression hearing in Gannett, an issue which, in his view, the Court had not decided in Gannett or Richmond Newspapers. Id. Justice Blackmun reiterated his continuing belief in the Sixth Amendment right of access he identified in Gannett, while nonetheless accepting the First Amendment right of access found by the Court. Id. at 603 and n.3 (Blackmun, J., concurring in judgment). Justice Rehnquist, as the lone dissenter, adhered to his Gannett views that there is no First Amendment right of access. Id. at 604-06 (Rehnquist, J., dissenting).

In a two-prong analysis which has become a staple of access decisions, Justice Brennan, writing for the Court, explained that this right was based upon (1) the historically open nature of criminal trials and (2) the function of public access to a criminal trial, which "enhances the quality and safeguards the integrity of the fact finding process, . . . fosters an appearance of fairness, . . . [and] permits the public to participate in and serve as a check upon the judicial process." Id. at 606. He also made clear that mandatory closures of trials or portions of trials cannot withstand constitutional scrutiny. Instead, a case-by-case assessment is constitutionally required.

Although recognizing a constitutional right of access, the Court held that such access rights are not absolute. A trial may be closed if the party seeking closure demonstrates a compelling government interest. However, the restrictions on access must be narrowly tailored to serve that interest. Id. at 606-07.

Two years later, the Supreme Court further expanded the First Amendment right of access. In Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) ("Press-Enterprise I"), the Court reviewed a trial court's closure of a six week voir dire of the potential jurors for a trial about the rape and murder of a teenage girl, The trial court had held that, if the media attended, potential jurors' responses to questions would lack the candor necessary to insure a fair trial. Id. at 503. The trial court also refused to release the transcript of the voir dire, either after the jury was impaneled or after the defendant had been convicted and sentenced, on the grounds that release of such a transcript would violate the jurors' rights of privacy and the "implied promise of confidentiality" the prosecutor represented that he had given prospective jurors. Id. at 504.

After reviewing historical accounts of open jury selection (id. at 505-08), the Supreme Court held that the "presumption of openness" with respect to a voir dire examination "may be overcome only by an overriding interest based on findings that

closure is essential to preserve higher values and is narrowly tailored to serve that interest." Id. at 510. Such a government interest must be articulated, along with specific findings, so a reviewing court can determine whether closure was proper. Id.

The Court concluded that the Sixth Amendment and juror privacy interests did not warrant closure, because there were no findings showing that an "open proceeding in fact threatened those interests" and because the trial court had failed to consider any less restrictive alternatives. Id. at 510-11. While acknowledging that privacy interests "may, in some circumstances, give rise to a compelling interest" (id. at 511), the Court suggested, as an alternative, that the trial court could ask general voir dire questions in open court to see if any member of the venire had something embarrassing or private which they wished to present in camera. Id. at 512. The Court also held that the trial court erred by failing to unseal non-confidential parts of the voir dire transcript. Id. at 513.

Press-Enterprise I established that the First Amendment right of access was not strictly limited to "trials," but precisely how far that right extended was unclear. The next case to reach the Court raised that issue, although in a Sixth Amendment context. In Waller v. Georgia, 467 U.S. 39 (1984), the Court again expanded rights of access to criminal proceedings, unanimously holding that a criminal defendant's Sixth Amendment right to a public trial extends to a pre-trial suppression hearing. Id. at 43. Closure could be ordered over the defendant's objection only if "the party seeking to close the hearing . . . advance[s] an overriding interest that is likely to be prejudiced, the closure [is] no broader than necessary to protect that interest, the trial court . . . consider[s] reasonable alternatives . . ., and it . . . make[s] findings adequate to support the closure." Id. at 48. The Court found the trial court's order completely closing a seven day suppression hearing was improper where the privacy interests the trial court sought to protect related to only two and a half hours of wiretap audiotapes played during the hearing. The transcript

of the suppression hearing, which the trial court released to the public only after an open trial had resulted in the defendant' partial acquitta revealed that most of the hearing concerned the procedures for making the tapes and allegations of police and prosecutorial misconduct. Id. at 42-43.

Because the defendant, not the media, challenged the closure order in Waller, the Court did not have to, and chose not to, reconsider the sue of the media' right of access to pre-trial suppression hearing under either the ixth or First Amendments. However Waller strongly suggested that the Court would find constitutional right of access to pre-trial criminal proceedings and the Court was soon faced with this issue

In Press-Enterprise Co. v. Superior Court, 478 U.S. (1986) ("Press Enterprise II"), the Supreme Court reviewed a case in which a lengthy preliminary hearing and the transcript of the hearing had been sealed on the grounds that the case "had attracted national publicity and only one side may get reported in the media. 478 U. at 4. In analyzing the propriety of the proceedings below the Supreme Court elaborated upon the guiding principles enunciated in its earlier access opinions, stating "[t]he right to an open public trial is shared right of the accused and the public, the common concern being the assurance of fairness. Id. at 7. The Court then rejected the pre-tri l/trial distinction "because the First Amendment question cannot be resolved solely on the label [the court give[s] the event, i.e., 'trial' or otherwise, particularly where the preliminary hearing functions much like a full scale trial.' 47 U.S. at 7.

The Press Enterprise II Court then app ied the two-part test to determine whether there 'a qualified First Amendment right of public access attaches" to "preliminary hearings as conducted in California. Id. at 0. First, the Court considered "whether the place and process has historically been open to the press and general public. It then consid red "whether public access has play[ed]

a significant positive role in the functioning of the particular process in question." 478 U.S. at 8-9. Concluding that a qualified First Amendment right of access existed under this analysis, the Court found that it could not be overcome by "'an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" 478 U.S. at 9 (quoting Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984)). Interestingly, the Court noted that the absence of a jury at preliminary hearings makes public access "even more significant" because there is no jury to check the prosecutor or the judge. Id. at 12-13. Also, there is a "'community therapeutic value' of openness," especially where "certain violent crimes" are involved. Id. at 13.

Having firmly established a First Amendment access right, the Court rejected the California Supreme Court's holding that a preliminary hearing could be closed "'upon finding a reasonable likelihood of substantial prejudice.'" Id. at 14. Instead, the Court said, when a defendant's fair trial rights are asserted: "[t]he preliminary hearing shall be closed only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's free trial rights." Id. Explaining this closure standard, the Court noted that the "risk of prejudic[ial pretrial publicity] does not automatically justify refusing public access to hearings on every motion to suppress." Id. at 15 (emphasis added).

With Press Enterprise II, the Supreme Court had come full circle from Gannett. A First Amendment right of access was established and extended to pre-trial and trial criminal proceedings. This right can only overcome by specific findings that closure is essential to preserve a compelling or overriding state interest, that

any closure is narrowly tailored to serve that interest, and that there are no adequate alternatives to closure.[5]

2. THE MEDIA'S INTEREST IN THE COURTS

What news is of interest to the media? Whatever is of interest to the public, of course. This means that the media is interested in almost any kind of human endeavor. The types of cases in which courts will likely face media requests for access to court proceedings, transcripts, evidence, and court documents -- or media opposition to requests for closure -- include those involving celebrities, public officials and public figures, unique situations, and serious crimes. Recent high profile examples of cases in which the media has sought access include the Menendez brothers trial, the Reginald Denny trial (in which certain juror transcripts were initially sealed), the O.J. Simpson trial, and the criminal proceedings related to Heidi Fleiss (in which the government initially filed several documents under seal). Criminal cases tend to be of more public interest than civil cases, but this is not an inflexible rule, as the suit filed against Michael Jackson for allegedly molesting a young boy demonstrates.

As the Restatement has recognized:

> To a considerable extent, in accordance with the mores of the community, the publishers and broadcasters have

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5 While the Supreme Court has not squarely held that this right extends to civil cases, other courts have so held. See, e.g., Publicker Indus. v. Cohen, 733 F.2d 1059 (3d Cir. 1984); In re Iowa Freedom of Information Council, 724 F.2d 658 (8th Cir. 1983); Newman v. Graddick, 696 F.2d 796 (11th Cir. 1983). See also In re Astri Inv. & Sec. Corp., 88 Bankr. 730 (D. Md. 1988) (recognizing right of access to bankruptcy creditors' meeting). But see Cincinnati Gas and Elec. Co. v. General Elec. Co., 854 F.2d 900 (6th Cir. 1988) (no right of access to summary jury trial), cert. denied, 489 U.S. 1033 (1989).

> themselves defined the term ["news"], as a glance at any morning paper will confirm. Authorized publicity includes publications concerning homicide and other crimes, arrests, police raids, suicides, marriages and divorces, accidents, fires, catastrophes of nature, a death from the use of narcotics, a rare disease, the birth of a child to a twelve-year-old girl, the reappearance of one supposed to have been murdered years ago, a report to the police concerning the escape of a wild animal and many other similar matters of genuine, even if more or less deplorable, popular appeal.

Restatement (Second) of Torts § 652D, comment g (1977).

Given increasing public demand for news regarding trials and other court proceedings, the courts should expect increased media requests for access to court proceedings and documents which one or both parties might wish to remain closed.

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